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THE *DROIT DE SUITE*: WHY AMERICAN FINE ARTISTS SHOULD HAVE THE RIGHT TO A RESALE ROYALTY

Michael B. Reddy*

*"[C]opyright could . . . stand upon no other foundation, than natural justice and common law."*¹

*"The utility of this power will scarcely be questioned. The copy right [sic] of authors has been solemnly adjudged in Great Britain to be a right at common law. . . . The public good fully coincides . . . with the claims of individuals."*²

*"The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors"*³

*"I've been working my ass off just for you to make that profit!"*⁴

I. INTRODUCTION

The *droit de suite*,⁵ or an artist's resale royalty, was first enacted into

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1. Millar v. Taylor, 98 Eng. Rep. 201, 207 (K.B. 1769).

2. THE FEDERALIST NO. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961).

3. Mazer v. Stein, 347 U.S. 201, 219 (1954).

4. Painter Robert Rauschenberg to art collector Robert Scull after the resale of his painting "Thaw" for \$85,000, the painting was purchased ten years earlier by Scull for \$900. R. DUFFY, ART LAW: REPRESENTING ARTISTS, DEALERS AND COLLECTORS 264 (1977) (citing Roger Ricklefs, *Artists Decide They Should Share Profits on Resale of Paintings*, WALL ST. J., Feb. 11, 1974, at 1; Robert Hughes, *A Modest Proposal: Royalties for Artists*, TIME, Mar. 11, 1974, at 66).

5. The phrase *droit de suite* comes from French real property law. An owner or creditor has a "right of following" (literal translation) to pursue the current holder of the property, even a bona

law by France in 1920.⁶ Since then, French fine artists have had the right to be paid a royalty from the proceeds of any resale of their work.⁷ Often characterized as a pecuniary right,⁸ the *droit de suite* is more accurately defined as a hybrid of the moral right (*droit moral*) and the author's right (*droit d'auteur*),⁹ because it is an offshoot of both the inalienable right of paternity¹⁰ and the right to participate in the future economic exploitation of a work.¹¹

Since its introduction nearly seventy-five years ago, the *droit de suite* has been adopted by twenty-eight nations¹² and has been incorporated into Article 14^{ter} of the Berne Convention.¹³ In 1976, California passed the

fide one, to satisfy claims against it. Barbara Ringer, Book Review, 16 COLUM.-VLA J.L. & ARTS 247, 250.

6. Law of May 20, 1920, 1920 B.L.D. 236, 20 Duv. & Boc. 539, Imposing on Public Sales of Artworks A Right Inuring to the Benefit of Artists, reprinted in LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE* IN LITERARY AND ARTISTIC PROPERTY 4 (Louise-Martin-Valiquette trans., 1991).

7. For a recent codification of the *droit de suite* in French copyright law, see Loi du 11 Mars 1957, No. 57-296, Sur La Propriete Literaire Artistique, J.O., translated in UNESCO, Copyright Laws and Treaties of the World (1976).

8. Rita E. Hauser, *The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law*, 11 COPYRIGHT L. SYMP. (ASCAP) 1, 13-14 (1962).

9. LILIANE DE PIERREDON-FAWCETT, *THE DROIT DE SUITE* IN LITERARY AND ARTISTIC PROPERTY 32 (Louise-Martin-Valiquette trans., 1991) ("The *droit de suite* merges into and combines with the moral right, a personality right, and assumes some of its characteristics.") (citations omitted).

10. *Id.* at 31.

In his report on the bill to inaugurate the *droit de suite*, Abel Ferry maintained: "The invisible bonds which connect the author to his painting are made explicit by us in the statutory language. . . . We establish in the law that paternity which the dealer or the collector appeals to for speculative purposes but that they seek to minimize in the interest of greater profit." According to this theory, the *droit de suite* has no autonomous existence but is a consequence of the Moral right [of paternity].

Id. (citation omitted).

11. *Id.* at 32-33.

Taking, as it does, the form of an automatic collection of a sum of money on each resale of the work, the *droit de suite* actually is, among authors' rights, the one which has the clearest pecuniary aspect: there is exploitation without the author's approval In this context, the *droit de suite* would be essentially an economic right.

Id.

12. Algeria, Belgium, Brazil, Chile, Congo, Costa Rica, Czechoslovakia, Ecuador, France, Germany, Guinea, Holy See, Hungary, Italy, Ivory Coast, Luxembourg, Madagascar, Mali, Morocco, Peru, Philippines, Portugal, Senegal, Spain, Tunisia, Turkey, Uruguay, and Yugoslavia. See DE PIERREDON-FAWCETT, *supra* note 9, at 6.

13. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris, May 4, 1896; revised in 1908, 1914, 1928, 1948, 1967, and most recently in Paris in 1971, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. 37 (1986), 3 Copyright Laws and

first *droit de suite* legislation in the United States.¹⁴ In addition, in the last fifteen years there have been numerous unsuccessful attempts by the United States Congress to amend the Copyright Act¹⁵ to provide for a federal resale royalty.¹⁶ However, when President Bush signed legislation in 1990 protecting the moral rights of fine artists,¹⁷ the Register of Copyrights was required to study and report on the advisability of enacting a federal resale royalty right.¹⁸

A Report was issued by the Register in December of 1992.¹⁹ The Report emphasized that more evidence regarding the possible effects of a resale royalty on artists and the art market should be gathered, and it ultimately recommended against the adoption of the *droit de suite*.²⁰ The Report also advised the United States to wait and see if the nations of Europe would proceed with plans to harmonize their intellectual property laws, including the *droit de suite*.²¹ The Register concluded the Report by providing a model resale royalty system for Congress to use if it later decided to amend the 1976 Act.²² Given the controversial nature of the *droit de suite*, there have been both supporters²³ and critics²⁴ of the Report.

This Article argues that Congress should adopt a resale royalty provision on the grounds that it would: (1) redress the unfair treatment historically given American creators of fine art²⁵ under our nation's

Treaties of the World (BNA), Multilateral Conventions, Berne Copyright Union: Item H-I at 1, art. 14^{ter}.

14. CAL. CIV. CODE § 986 (West 1982 & Supp. 1995).

15. 17 U.S.C. § 101 (1988 & Supp. 1993).

16. S. 2796, 99th Cong., 2d Sess. (1986) and H.R. 5722, 99th Cong. 2d Sess. (1986); S. 1619, 100th Cong., 1st Sess. (1987) and H.R. 3221, 100th Cong., 1st Sess. (1987).

17. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter "VARA"].

18. *Id.* at § 608(b) (codified at 17 U.S.C. § 106A (1976 & Supp. 1992)).

19. U.S. COPYRIGHT OFFICE, *DROIT DE SUITE: THE ARTIST'S RESELL ROYALTY* (1992) [hereinafter "REPORT"].

20. *Id.* at xv.

21. *Id.*

22. *Id.* at 151.

23. See John Henry Merryman, *The Wrath of Robert Rauschenberg*, 40 J. COPYRIGHT SOC'Y 241 (1993); see also Elliott C. Alderman, *Resale Royalties in the United States for Fine Visual Artists: An Alien Concept*, 40 J. COPYRIGHT SOC'Y 265 (1993).

24. See Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 40 J. COPYRIGHT SOC'Y 284 (1993); Carol Sky, *Report of the Register of Copyrights Concerning Droit de Suite, The Artist's Resale Royalty: A Response*, 40 J. COPYRIGHT SOC'Y 315 (1993).

25. For purposes of this Article, the term "fine art" is defined in the same way as the term "visual art" in VARA, e.g., "a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer" VARA, *supra* note 17, at § 602 (codified at 17

copyright laws;²⁶ (2) fulfill the original intent of the Copyright Clause²⁷ by providing an economic incentive for the creators of fine art;²⁸ (3) conform with the natural law bases of both French and Anglo-American copyright;²⁹ and (4) advance the economic interests of the United States by bringing American copyright law into harmony with thirty-six other members of the Berne Convention.³⁰

First, the Article will review the general history of moral rights³¹ and the *droit de suite*,³² with special emphasis on their French origins.³³ Second, the Article will examine efforts to introduce the *droit de suite* into American law, culminating with the passage of the Visual Artists Rights Act of 1990 ("VARA").³⁴ Third, it will review criticisms of the Report of the Register of Copyright and summarize rebuttals to the four main arguments made against the *droit de suite*.³⁵ Finally, the Article will make four arguments in favor of adopting of a resale royalty, and will conclude that legislation providing American fine artists with this right should be passed by the United States Congress.

II. ORIGINS OF THE *DROIT DE SUITE*

A. Moral Rights Generally

To understand the specific origins of the fine artist's *droit de suite*, one must first examine the development in France of the moral rights of

U.S.C. § 101) (1988 & Supp. 1993).

26. See Donald M. Millinger, *Copyright and the Fine Artist*, 48 GEO. WASH. L. REV. 354 (1980); Jacqueline Fabe, *The Fine Artist's Right to the Reproductions of His Original Work*, 23 COPYRIGHT L. SYMP. (ASCAP) 81 (1977); Daniel Brenner, *A Two-Phase Approach to Copyrighting the Fine Arts*, 24 BULL. COPYRIGHT SOC'Y 85 (1976).

27. U.S. CONST. art. I, § 8, cl. 8.

28. Thomas M. Goetzl, *In Support of the Resale Royalty*, 7 CARDOZO ARTS & ENT. L.J. 249, 259 (1989).

29. See Gary Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM.-VLA J.L. & ARTS 381 (1985).

30. See Karen Y. Crabbs, *The Future of Authors' and Artists' Moral Rights in America*, 26 BEVERLY HILLS B.A.J. 167, 168 (1992).

31. See Dan Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155 (1983).

32. For a comprehensive history of the *droit de suite*, see J.-L. DUCHEMIN, *LE DROIT DE SUITE DES ARTISTS* 149 (1948).

33. See DE PIERREDON-FAWCETT, *supra* note 9, at 1-6.

34. See Thomas M. Goetzl & Stuart A. Sutton, *Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis*, 9 COLUM.-VLA J.L. & ARTS 15 (1984).

35. See Merryman, *supra* note 23; see also Alderman, *supra* note 23.

creators generally, because the *droit de suite* is the natural outgrowth of French moral rights jurisprudence.³⁶ While the role of the artist in Europe had been changing for centuries, the French Revolution provided the impetus for granting French artists the first economic rights in their works. Thereafter, the French courts expanded on these rights granted by the legislature, and ultimately provided artists with the familiar forms of moral rights that are recognized throughout the world today.³⁷

Until the Renaissance, individual artists merely produced works to satisfy the desire of their royal and ecclesiastical patrons in exchange for their patronage.³⁸ "The Renaissance restored the importance of Man as an Individual and thus completely transformed the artist's status."³⁹ Artists began to sign their works, and the law began to develop rules for protecting the distinctive expression of an individual's personality embodied in his works.⁴⁰

French authors were first granted the exclusive right of reproduction in 1791,⁴¹ and performance in 1793.⁴² These two decrees were concerned solely with the pecuniary rights protected under Anglo-American copyright law and acted as the bases for French copyright law until their provisions were codified in 1957.⁴³ From the beginning, however, it was argued that even though the revolutionary legislature had theoretically provided fine artists with the same rights as authors of books, drama, or music, the fine artists were in fact unable to equally exploit their works because of the unique nature of paintings and sculptures.⁴⁴

Despite the initial focus on the economic rights of authors, the French courts gradually acknowledged that creations of intellect were fundamentally different than other forms of property, since a work of art is not simply an object but is also an embodiment of its creator's thoughts and personality.⁴⁵ Thus, the French courts concluded that an artist has a permanent relationship with his or her art.⁴⁶ This profound insight into

36. DE PIERREDON-FAWCETT, *supra* note 9, at 1-4.

37. *Id.* at 1.

38. *Id.*

39. *Id.*

40. *Id.*

41. The Decree of Jan. 13-19, 1791 (Fr.), reprinted in DE PIERREDON-FAWCETT, *supra* note 9, at 1 n.1.

42. The Decree of July 19, 1793 (Fr.), reprinted in DE PIERREDON-FAWCETT, *supra* note 9, at 1 n.1.

43. Hauser, *supra* note 8, at 13-14.

44. DE PIERREDON-FAWCETT, *supra* note 9, at 2.

45. Hauser, *supra* note 8, at 14.

46. *Id.* at 14.

the relationship between an artist and his work provided the justification for French law to recognize that all artists have four perpetual and inalienable moral rights. These rights are: (1) the right of paternity (*droit a la paternite*);⁴⁷ (2) the right of integrity (*droit au respect de l'oeuvre*);⁴⁸ (3) the right to release (*droit de divulgation*);⁴⁹ and (4) the right to withdraw or modify (*droit de retrait ou de repentir*).⁵⁰

The right of paternity gives an author the right to be recognized as the creator of a work, the right to remain anonymous if desired, and the right to not be associated with another's work.⁵¹ The right of integrity is often characterized as the most important moral right. It gives a creator the legal power to exercise control over a work, even after it has been sold or transferred, and to prevent its alteration, distortion, or mutilation.⁵² The right to release provides the author an exclusive right to decide when a work should be disclosed to the public.⁵³ Finally, the right to withdraw or modify is the most limited of the moral rights. It allows an author to withdraw or modify a work even after it has been released to the public, although the owner must be indemnified in advance for any damage that will result from the withdrawal or modification.⁵⁴

In most nations utilizing this copyright system, artists can never transfer all of their interests in a given work. Since moral rights are personal and perpetual, inhering in the author and not the work, the rights cannot be transferred or waived.⁵⁵ However, both the United Kingdom and Canada have recently passed moral rights legislation that allows a waiver of these moral rights. For these reasons, some French jurists have suggested dispensing with the concept of "property" when analyzing intellectual creations.⁵⁶ While this approach has often been seen as antithetical to the Anglo-American view that copyright is merely another form of property capable of being owned and sold, it is in reality not in

47. Fortin c. Prevost-Blondel, 1865 D.P. II 243.

48. Sorel c. Fayard Freres, 1900 D.P. II 152.

49. Pourchet c. Rosa Bonheur, 1865 D.P. II 201.

50. Christine L. Chinni, *Droit D'Auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145, 153-4 (1992).

51. *Id.* at 154.

52. *Id.* at 155.

53. *Id.* at 152.

54. *Id.* at 154.

55. Chinni, *supra* note 50, at 152 (citing Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980)).

56. Hauser, *supra* note 8, at 15.

conflict with Anglo-American laws.⁵⁷ The United States recognized that moral rights are necessary and desirable when it became a member of the Berne Convention, which incorporates the French belief in moral rights into its Article 6*bis* in 1989.⁵⁸

B. *The Droit de Suite Specifically*

The concept of the *droit de suite* was first used in connection with the artist's resale royalty right over one hundred years ago in an article by Albert Vaunois.⁵⁹ A French attorney, Edouard Mack, then raised the issue of the *droit de suite* in his 1896 report to the Berne Congress of the International Literary and Artistic Association.⁶⁰ The Societe des Amis du Luxembourg was formed in Paris in 1903 with the specific purpose of enacting the *droit de suite* into law.⁶¹ Its draft proposal issued one year later eventually served as the basis for the 1920 Act.⁶²

Thereafter, the French press began promoting the *droit de suite* by publicizing the economic difficulties of fine artists and the enormous disparities between the original sale prices and the large resale sums obtained by art dealers.⁶³ Some oft-cited examples of this disparity include the resale of a Degas painting originally purchased for 500 francs and later resold in 1912 for 436,000 francs; Millet's *Angelus*, resold for a million francs a few years after its original sale price of 70,000 francs; and a portrait by Duval de l'Epinay, which had a resale price of 660,000 francs just nine years after it was purchased for 5,210 francs.⁶⁴

The plight of artists' heirs was given special emphasis in a widely published drawing which showed an auctioneer pounding his hammer down saying, "100,000 francs, gone!", while two children in rags sitting in the front row shouted, "Look, one of Papa's paintings!"⁶⁵ The fundamental unfairness of the art market middlemen reaping enormous profits while artists and their families received nothing was summed up in one account as "real gold for the speculator, fool's gold for the artist."⁶⁶

57. Chinni, *supra* note 50, at 156-57.

58. *Id.* at 157.

59. DE PIERREDON-FAWCETT, *supra* note 9, at 2. The Vaunois Article was published in the *Chronique de Paris* on Feb. 25, 1893.

60. Hauser, *supra* note 8, at 3-4.

61. *Id.*

62. *Id.*

63. DE PIERREDON-FAWCETT, *supra* note 9, at 3 (citations omitted).

64. *Id.* at 2.

65. *Id.* at n.14.

66. *Id.* at 3 (citation omitted).

As a result of these efforts by the popular press and other proponents of the *droit de suite*, the French public supported efforts to legislate an artist's resale royalty right. The rationale for the *droit de suite* was that the fine artist was not protected under existing copyright laws simply because of the nature of his work.⁶⁷ This lack of protection was a clear defect of the laws of 1791 and 1793, therefore "[i]t [was] not alms [the authors] ask[ed] [for], but a property right."⁶⁸

The initial debates on the *droit de suite* were halted by World War I. Though Abel Ferry, the original sponsor of the bill, was killed in the war, the bill was reintroduced in 1918.⁶⁹ It was adopted without further discussion by both Houses of the French Parliament and signed by the President on May 20, 1920.⁷⁰ The law granted artists a right of participation in the public sales of their works of art.⁷¹ The *droit de suite* legislation required sellers of fine art to pay a percentage of the resale price to the artist of any work sold at public auction.⁷² Initially, this inalienable right only applied to public sales because they could be controlled more easily.⁷³ Furthermore, the right belonged to the artist and his heirs for the duration of the copyright.⁷⁴

The most recent French version of the *droit de suite* is found in the 1957 Copyright Law.⁷⁵ It now provides for the payment of a flat three percent royalty on the resale price on all "graphic and plastic works" sold for more than 100 francs, and subsists for the life of the author plus fifty years.⁷⁶ Since 1957 the *droit de suite* has been extended to sales "through a dealer" as well as public auctions. However, since no rules implementing this provision were ever issued, the resale royalty is in reality only collected at auction.⁷⁷

The *droit de suite* is collected in France primarily through two private authors' societies: *Societe de la Propriete Artistique et des Dessins et Models* ("SPADEM") and the *Association pour la Diffusion des Arts Graphiques et Plastiques* ("ADAGP"). These societies are similar to

67. *Id.* at 4.

68. Hauser, *supra* note 8, at 5 (quoting Abel Ferry, 1914 J.O., Chambre des Deputes, Doc. parl., annexe 3423, at 150 et seq., 2d Sess. of Jan. 23, 1914).

69. DE PIERREDON-FAWCETT, *supra* note 9, at 4.

70. Hauser, *supra* note 8, at 5.

71. DE PIERREDON-FAWCETT, *supra* note 9, at 4.

72. *Id.*

73. *Id.*

74. The Law of Mar. 11, 1957, No. 57-298, tit. I, art. 6 (Fr.).

75. *Id.*

76. REPORT, *supra* note 19, at 12.

77. *Id.* at 22.

ASCAP and BMI, the societies established to enforce composers' and performers' rights in the United States.⁷⁸

C. *The Legal Justification for the Droit de Suite*

The original concept underlying the *droit de suite* was participation by the artist in the increase in value of his work over time as reflected in a resale.⁷⁹ This theory was objected to on the grounds of fairness, since the artist was not required to share in any loss of the seller. In addition, it was argued that it would be unfair to give this right to artists if it was not given to all sellers of property.⁸⁰

Supporters of the *droit de suite* responded to these objections by focusing on the unique nature of art and the "causal relationship" between its creator and the subsequent increase in value of a work, which does not exist with other forms of property.⁸¹ The primary justification for the *droit de suite* lies in the legal recognition of the personal link between the artist and his work, which acknowledges that art is not merely an economic asset, but is a continuing projection of the artist's personality. Hence, artists should be able to share in the subsequent exploitation of their works through the mechanism of a resale royalty, at first based on the appreciation in value and later on the sale price.⁸²

Further justification for the *droit de suite* as a new exploitation right was found by contrasting the opportunities granted fine artists for capitalizing on their works under existing copyright law with those given to writers and composers.⁸³ The latter are able to share in the profits generated by the subsequent mass production, recording, transmission, and performance of their works, while the former create one-of-a-kind objects, which cannot be copied, and hence cannot be exploited by their creator beyond their initial sale.⁸⁴

Yet, the original work of art is traditionally considered to have a special quality that has no equivalent in other creative fields. An original is generally viewed as "the one and only perfect embodiment of that work which cannot be matched even by the best reproduction" and thus is the

78. *Id.* at 26.

79. DE PIERREDON-FAWCETT, *supra* note 9, at 11.

80. *Id.*

81. *Id.*

82. *Id.*

83. Paul Katzenberger, *The Droit de Suite in Copyright Law*, 4 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 361, 365-68 (1973).

84. DE PIERREDON-FAWCETT, *supra* note 9, at 18.

only source of "complete artistic enjoyment."⁸⁵ This explains why originals are so highly valued by art dealers and collectors.

It has been said that a logical consequence of the intrinsic value of original works of fine art is that any transfer of ownership is, in effect, another exploitation of the work because "a new circle of users" are provided with this perfect enjoyment, which could only be accomplished through its resale.⁸⁶ Thus, critics of the resale royalty, who merely see a transfer in the ownership of a tangible object when art is resold, are simply wrong in arguing that the *droit de suite* is not analogous to the exploitation rights given to other creators under copyright law.⁸⁷

Eighty years ago Abel Ferry eloquently summarized the legal basis for this new right in his report on the proposed *droit de suite*:

We are not asking for a share of the profits on a possible speculation, but for the extension of the laws on artistic property, regardless of the existence of an appreciation or depreciation in value. There is a gap in this developing branch of the law on literary and artistic property. Literary men, musicians, and playwrights are members of powerful associations. They can exact for each recital, each performance, each publication, a fee which occasionally gives them large revenues. They derive their fortune from the people generally while the painter earns his living from the single collector. What he creates cannot be published but has, however, the character of personal property and this is why the provisions of a code drafted when literary and artistic property was not even known are urged against him. While the property of other intellectual workers is full and undivided, that of the artist is incomplete.⁸⁸

D. The Internationalization of the *Droit de Suite*

In 1921, one year after France's recognition of the *droit de suite*, a similar statute was enacted in Belgium.⁸⁹ Although the original rationale of the resale royalty was to give artists the right to share the increase in value of their work with the assorted middlemen in the art market, both the

85. Katzenberger, *supra* note 83, at 368.

86. *Id.*

87. *Id.* at 368-69.

88. Abel Ferry, 1914 J.O., Chambre des Deputes, Doc. parl., annexe 3423, at 150 et seq., 2d Sess. of Jan. 23, 1914.

89. DE PIERREDON-FAWCETT, *supra* note 9, at 4.

French and Belgian forms of the *droit de suite* were based on the sale price alone. This made collection of the royalty much easier, but led to characterizations of the *droit de suite* as "a new tax for the benefit of artists."⁹⁰

As a result of these criticisms, when Czechoslovakia passed its version of the *droit de suite* in 1926, it provided for the payment of a percentage from the profit realized by the owner upon resale.⁹¹ This more conceptually consistent approach proved to be a failure. Because it was too difficult to monitor prior sales prices, the calculation of any appreciation became practically impossible.⁹² Thus, the *droit de suite* became "the prisoner of its own logic," betraying its historical justification when based on the sales price and becoming highly impracticable when based on the appreciation in value.⁹³

The jurisprudential confusion about its proper legal basis slowed the spread of the *droit de suite*. By 1941, only Poland, Uruguay, and Italy had adopted the resale royalty.⁹⁴ Despite these problems, the *droit de suite* was given new life when it was introduced, albeit as an optional provision for member states, at the Berne Convention at the Brussels Conference of 1948.⁹⁵ Since then, it has made its way into the copyright laws of twenty-eight countries, although substantial royalties are only collected in Belgium, France, Germany, Hungary, and Spain.⁹⁶

In more recent years, a *droit de suite* provision was included in the model copyright law for developing countries.⁹⁷ Eleven additional countries expressed approval for the resale royalty principle in response to

90. *Id.* at 5 (citations omitted).

91. *Id.*

92. *Id.*

93. *Id.*

94. DE PIERREDON-FAWCETT, *supra* note 9, at 5.

95. Article 14^{ter} originally appeared as Article 14^{bis} in the Brussels version of the Berne Convention, June 26, 1948. The English translation of its text reads as follows:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

Berne Copyright Union: Item H-I, at 7, CLTW Supp. (1972).

96. REPORT, *supra* note 19, at 140-41.

97. Tunis Model Law on Copyright and Commentary § 4^{bis}, 10 COPYRIGHT BULL. 10, 15-16 (1976).

a questionnaire distributed by the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") and the World Intellectual Property Organization ("WIPO") in 1983.⁹⁸ In what may prove to be the single most important development leading to the eventual enactment of the artist's resale royalty in the United States, the European Community is currently considering legislation that would harmonize and generalize European *droit de suite* statutes in order to create "an internal market of undistorted competition in which cultural goods and services [will] flow unimpeded."⁹⁹

III. DROIT DE SUITE EFFORTS IN THE UNITED STATES

A. Beginnings

The artist's resale royalty first became an issue in the United States in 1948 in connection with the sale of Grant Wood's painting, *Daughters of the American Revolution*.¹⁰⁰ When an art dealer resold this painting for four times the original price shortly after its purchase from Wood, the angry painter vowed that all of his future sales contracts would stipulate that he would receive fifty percent of the profits from each subsequent resale.¹⁰¹ While the art industry had developed various forms of contractual resale royalty provisions,¹⁰² they were seen as inadequate substitutes for a legislated right under copyright law. This was primarily because of the unequal bargaining position of younger artists and problems relating to privity of contract.¹⁰³

The first proposals for bringing the formal *droit de suite* to the United States were made in two seminal law review articles published in the early 1960's.¹⁰⁴ It was not until 1973, however, that the idea of a resale

98. The eleven countries are Argentina, Bolivia, Dominica, Greece, Mexico, Poland, Rwanda, Sri Lanka, Thailand, Upper Volta, and Zaire. Barbara Ringer, Book Review, 16 COLUM.-VLA J.L. & ARTS 247, 251 n.20 (1992).

99. Theodore M. Shapiro, *Droit de Suite: An Author's Right in the Copyright Law of the European Community*, 4 ENT. L. REV. 118, 124 (1992).

100. Neil F. Seigel, *The Resale Royalty Provisions of the Visual Artists Rights Act: Their History and Theory*, 93 DICK. L. REV. 1, 2 (1988).

101. *Id.*

102. The best known of these little-used contracts is the Artists' Reserved Rights Transfer and Sale Agreement or 'Projansky Agreement'. It was drafted by the New York art lawyer, Robert Projansky. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 862 (1st ed. 1978).

103. Seigel, *supra* note 100, at 2; see also *supra* note 8 and accompanying text.

104. Diane B. Schulder, *Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States*, 61 NW. U. L. REV. 19 (1966-67); see also Hauser, *supra* note

royalty became well-known.¹⁰⁵ The widely reported confrontation between painter Robert Rauschenberg and art dealer Robert Scull over the enormous profit made on the resale of one of Rauschenberg's works brought the issue to the public's attention.¹⁰⁶ Within five years of that incident, Congress and the Ohio and California state legislatures introduced the first resale royalty bills.¹⁰⁷ However, only California passed the *droit de suite* into law.¹⁰⁸

B. The California Resale Royalties Act

California State Representative Alan Sieroty introduced the first state-sponsored *droit de suite* legislation in 1975.¹⁰⁹ His bill was initially defeated. Upon reintroduction the next year, it was signed into law by Governor Edmund G. Brown, Jr.¹¹⁰ Surprisingly, considering the controversy that had always surrounded the *droit de suite*, the California Act was passed with little fanfare or opposition from either side of the debate.¹¹¹

The law went into effect on January 1, 1977 and requires the seller of any work of fine art¹¹² sold for more than \$1000 to withhold five percent of the resale price for the benefit of the artist, provided that the resale price is greater than the original purchase price.¹¹³ If the artist cannot be located within ninety days by the seller, the royalty must be transferred to the California Arts Council which may use the money to purchase public art if the artist is not found within seven years.¹¹⁴

The law only applies if the seller is a resident of California or if the sale takes place there.¹¹⁵ In addition, the artist must either be a resident

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105. Seigel, *supra* note 100, at 3.

106. *Id.* at 3.

107. *Id.*

108. *Id.*

109. The City of Seattle was actually the first U.S. jurisdiction to recognize an artist's right to a resale royalty in its "Art in Public Places" ordinance. Seattle, Wash. Ordinance, 102,210, cited in Leonard D. Duboff, *Artists' Rights: The Kennedy Proposal to Amend the Copyright Law*, 7 CARDOZO ARTS & ENT. L.J. 227, 230 (1989).

110. Report, *supra* note 19, at 42 of Appendix, Part II.

111. John E. McInerney III, *California Resale Royalties Act: Private Sector Enforcement*, 19 U.S.F. L. REV. 1, 7 (1984) (quoting Cal. A.B. 1391, at 11 (May 12, 1975)).

112. The California statute defines "fine art" as "an original painting, sculpture, drawing, or an original work of art in glass." CAL. CIV. CODE § 986(c)(2) (West Supp. 1992).

113. *Id.* at § 986(a)(1).

114. *Id.* at § 986(a)(2), (5).

115. *Id.* at § 986(a).

of California for two years or be a U.S. citizen.¹¹⁶ To collect, the artist must bring an action under the Act for damages and reasonable attorney's fees within three years of the resale or one year of receiving actual notice of it, whichever is later.¹¹⁷ The artist cannot waive the right to receive resale royalties, although he can assign the right to collect them.¹¹⁸ Royalties must be paid to an artist's heirs for twenty years after the death of the artist.¹¹⁹

Shortly after its enactment, the constitutionality of the California Resale Royalties Act was challenged by art dealer, Howard Morseburg.¹²⁰ He claimed that the Act violated the United States Constitution's Due Process and Contracts Clauses.¹²¹ In addition, Morseburg argued that the federal Copyright Act of 1909 preempted the legislation.¹²²

The Ninth Circuit Court of Appeals upheld the constitutionality of the California Act in *Morseburg v. Balyon*.¹²³ Finding no violations of the Due Process or Contracts Clauses, the court restricted its preemption analysis to the 1909 Act.¹²⁴ It looked for guidance from prior United States Supreme Court decisions involving the possible federal preemption of state laws regulating intellectual property and their progeny.¹²⁵ Specifically relying on the rule laid down in *Goldstein v. California*,¹²⁶ the Ninth Circuit held that the 1909 Act: (1) did not expressly prohibit the enactment of a state *droit de suite* law and (2) could not reasonably be interpreted to imply such a prohibition on the grounds that such legislation impermissibly interfered with the exclusive rights to vend or transfer a copyrighted work.¹²⁷ Nevertheless, because of the unambiguous language

116. *Id.* at § 986(c)(1).

117. CAL. CIV. CODE § 986(a)(3) (West Supp. 1992).

118. *Id.* at § 986(a).

119. Katherine F. Rowe, *Visual Arts: Moral Rights and Resale Royalties*, in *ADVANCED WORKSHOP ON COPYRIGHT LAW* 1991, 307, 400-401 (PLI Pat., Copyright, Trademark, & Literary Prop. Prac. Course Handbook Series No. 312, 1991).

120. *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), *cert. denied*, 449 U.S. 983 (1980).

121. *Id.* at 974-77.

122. *Id.* The Copyright Act of 1909 was revised in 1976, but it did not become effective until after the date of the Morseburg purchase. Therefore, the court did not address the issue.

123. 621 F.2d 972 (9th Cir.), *cert. denied*, 449 U.S. 983 (1980).

124. "We do not consider the extent to which the 1976 Act, particularly section 301(a) and (b) . . . may have preempted the California Act." *Id.* at 975.

125. *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

126. 412 U.S. 546 (1973) (state legislation making the pirating of sound recordings a crime not preempted by federal copyright law where Congress had left the area unregulated).

127. *Morseburg*, 621 F.2d at 977-78.

found in both the legislative history¹²⁸ and the text of the Copyright Act of 1976,¹²⁹ there are serious doubts about whether the California resale royalty statute could withstand the same kind of scrutiny under the current copyright law.¹³⁰

The results of California's *droit de suite* are mixed, largely because the law requires the often uncooperative seller to withhold the royalty from the resale price, find the artist, and send him the proceeds. In a 1986 survey of artists conducted by Bay Area Lawyers for the Arts ("BALA"), thirty-two percent of the respondents said dealers had refused to give them the name or address of the buyer or even the resale price, despite their right under the law to assign collection of the royalty to another. In a comment submitted to the Copyright Office as part of its study of the *droit de suite*, California arts attorney Peter Karlen stated that artists are unable to collect their royalty because art dealers "feel they can get away with it."¹³¹ He also noted that many galleries will not deal with an artist who demands a written agreement. Even if the artist gets the gallery to agree to a contract, he must still rely on the dealer to provide all of the information regarding

128. According to the House Report, the policy of Section 301 was "intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively. . . ." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 130 (1976).

129. Section 301(a) of the 1976 Copyright Act reads:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301(a) (1988 & Supp. 1993).

130. See Lynn K. Warren, Comment, *Droit De Suite: Only Congress Can Grant Royalty Protection for Artists*, 9 PEPP. L. REV. 111, 128 (1981):

Since the 1976 Act makes it abundantly clear that once a copyright owner divests himself of ownership of a particular copy of his work, all his distribution rights, including the economic benefits of distribution, cease; therefore, the California Resale Royalties Act must fail. The five percent royalty conferred on the copyright owner upon resale extends the economic benefit he derives beyond that received from the original distribution of his work. Congress stressed that a state law is equivalent to copyright and subject to preemption even if the precise contours of the state-created right may not be coextensive with the comparable right under the Copyright Act of 1976. Therefore, although the conditions which the California statute places upon the distribution right of the copyright owner do not control that limited right, it sufficiently conflicts with congressional intent to be abrogated and preempted by the 1976 Act.

Id. (citations omitted).

131. Sky, *supra* note 24, at 317.

the resale, and to collect the royalty. Many dealers fail to do so for months or even years.¹³²

Proponents of the California resale royalty maintain that it benefits large numbers of artists and encourages more artistic production just as the public performance right stimulates the creativity of composers. Despite the difficulty of enforcing the current version of the law, art advocates as well as studies commissioned by BALA,¹³³ show that many California artists have received significant royalty payments.¹³⁴ These results confirm similar studies done in France that have demonstrated that large numbers of French artists have substantially benefitted from the *droit de suite* since its adoption in 1920.¹³⁵

Since 1976, two additional jurisdictions in the United States have enacted resale royalty provisions. Georgia recognizes the *droit de suite* as part of its "Art-in-State-Buildings Program." In this program, the state agrees to pay a royalty upon the resale of any art purchased with public funds other than as part of the sale of a building.¹³⁶ In 1988, the Commonwealth of Puerto Rico passed a comprehensive moral rights law, that includes a requirement that sellers must pay a five percent royalty to the artist from the profit realized on the resale of a work.¹³⁷

C. The Visual Artists Rights Act of 1990 ("VARA")

Unsuccessful efforts to amend the Copyright Act of 1976 to include the *droit de suite* have been made in both Houses of Congress periodically since the late 1970's. Representative Henry Waxman of California

132. *Id.*

133. See Alma Robinson, BALA [Bay Area Lawyers for the Arts] Surveys Artists and Galleries on Resale Royalties, BALA-Gram, Nov./Dec. 1986, at 1, reprinted in *Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 2 (1987).

134. Goetzl, *supra* note 28, at 255; see also REPORT, *supra* note 19, at 71 (At the January 1992 hearings on Artists' Resale Royalties in San Francisco, at least two artists testified to positive experiences and significant financial gain from the California statute. Richard Mayer, sculptor and Vice President of National Artists Equity Association, reported receiving resale royalties of \$25,520 in the last eight years. He reported that his experience was not unique. Ruth Asawa, a sculptor whose work has been commissioned for public places, testified that she received \$5,000 when Ghiradelli Square was sold, and \$7,000 when the San Francisco Hyatt was sold, both sales included a resale of one of her fountains.).

135. Note, *The Applicability of the Droit de Suite in the United States*, 3 B.C. INT'L & COMP. L. REV. 433, 440 (1980); see also REPORT, *supra* note 19, at 156 (chart showing that in 1990 approximately \$14.5 million in resale royalties were collected in France).

136. GA. CODE ANN. § 91-507(c) (Michie 1991).

137. 31 PUERTO RICO CIV. CODE § 1401(h) (1991).

introduced the Visual Artists Residual Rights Act of 1978;¹³⁸ later versions of VARA were sponsored by Representative Thomas Downey¹³⁹ and by Senator Edward Kennedy¹⁴⁰ in 1986, and Representative Edward Markey of Massachusetts in 1987.¹⁴¹

The original Kennedy-Markey bill, which was primarily aimed at guaranteeing visual artists the basic moral rights protections contained in Article 6*bis* of the Berne Convention, also provided for the payment of a royalty of seven percent from the resale profit whenever the sale price of a work of fine art was one hundred-fifty percent above the purchase price.¹⁴² However, due to opposition from art dealers, gallery owners, auction houses, and others, the resale royalty provision was dropped when the bill was reintroduced in 1989. Instead, the Copyright Office was required to study various ways visual artists could share in the increased value of their work, including a resale royalty.¹⁴³ When VARA was ultimately passed in 1990, the requirement for a study on the feasibility of enacting the *droit de suite* in the United States was retained.¹⁴⁴

IV. THE REGISTER OF COPYRIGHTS' REPORT ON RE SALE ROYALTIES

As required by VARA, on December 1, 1992, the Register of Copyright released to Congress its four hundred page, two volume report on the artist's resale royalty. The Report is divided into five parts with an Appendix volume and an executive summary. Part I provides an overview of the history and evolution of the resale royalty in specific nations like France, Belgium, Germany, Uruguay, and Czechoslovakia, as well as efforts to enact *droit de suite* legislation internationally. Part II reviews the American experience with resale royalties with a special focus on both the California law and the various failed attempts to enact a Federal Resale Royalty. Part III contains the Copyrights Office's analysis of the testimony given at hearings in New York and San Francisco and of the written comments that were submitted. Part IV examines the various arguments made by the proponents and opponents of the *droit de suite*. Part V explains the conclusions and recommendations of the Copyright Office

138. H.R. 11403, 95th Cong., 2d Sess. (1978).

139. H.R. 5722, 99th Cong., 2d Sess. (1986).

140. S. 2796, 99th Cong., 2d Sess. (1986).

141. H.R. 3221, 100th Cong., 1st Sess. (1987).

142. Rowe, *supra* note 119, at 402.

143. *Id.* at 403.

144. VARA, *supra* note 17, at § 608(b) (codified at 17 U.S.C. § 106A (1976 & Supp. 1992)).

regarding the artist's resale royalty. The Appendix volume contains copies of the comment letters and transcripts of the hearings analyzed in Part III.¹⁴⁵

Although the Register ultimately advised Congress not to adopt the *droit de suite*, it was clear that this advice was not absolute. The Report was based solely on the non-exhaustive evidence that was gathered by the Copyright Office during a limited period of time. The Register merely concluded that it was "not persuaded that sufficient economic and copyright policy justification exist[s] to establish the *droit de suite* in the United States."¹⁴⁶ While the Report ultimately opposed the immediate enactment of a federal resale royalty, it hedged its conclusion by saying that "[C]ongress may want to take another look" if the European Community decided to harmonize its *droit de suite* legislation and extended it to all of its member States.¹⁴⁷

The Report attempted to address the economic concerns of fine artists by suggesting that if they do need additional means for exploiting their work, there are a number of possible alternatives to the *droit de suite*. These alternatives include a broader public display right, a commercial rental right, compulsory licensing, and increased federal funding for the arts.¹⁴⁸ Lastly, the Report included a model *droit de suite* system that Congress could consider in the event that it decided "the time [was] ripe for introduction of *droit de suite* in the United States."¹⁴⁹

Soon after its release, both the methodology and substance of the Report were seriously questioned by a proponent of the *droit de suite*, Professor Shira Perlmutter of Catholic University.¹⁵⁰ Among other things, her article, "Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report," provides a thorough critique of the way evidence was gathered and evaluated by the Copyright Office, spotlights the one-sided nature of many of the Report's "findings," and persuasively rebuts the many arguments routinely made by opponents of the artist's resale royalty.¹⁵¹

The fundamental problem with the Report is that it draws its primary conclusion from a false assumption. It assumed that it could accurately

145. For excerpts from the New York hearing, see *Copyright Office Hearings on the Droit de Suite*, 16 COLUM.-VLA J.L. & ARTS 185 (1992).

146. REPORT, *supra* note 19, at 149.

147. *Id.*

148. *Id.* at 149-51.

149. *Id.* at 149.

150. See generally Perlmutter, *supra* note 24.

151. *Id.*

predict what the ultimate effects of a federal resale royalty would be on the market generally and fine artists specifically. The assumption was based solely on a single theoretical study of the California law's impact.¹⁵² It made this prediction despite its own admission that it did not have sufficient, current, and empirical evidence on the resale market nor on the amount of income that artists earn from the first sale of their works.¹⁵³

Professor Perlmutter's close examination of the Report revealed that despite the seemingly equivocal nature of its findings, it was written with a stylistically negative tone, and utilized a methodology that seemed to prejudice the merits of the proposed *droit de suite*.¹⁵⁴ As a result, evidence on both sides of the argument was neither weighed nor interpreted even-handedly. Real evidence of the positive impact of the *droit de suite* in California and in Europe was given less weight than abstract arguments against it.¹⁵⁵

Throughout the Report, the arguments of the opponents of the *droit de suite* were accepted on their face, while proponents' arguments were given strict scrutiny and found to be unconvincing.¹⁵⁶ The final result of this flawed approach was that even though the majority of the evidence gathered by the Copyright Office indicated support for resale royalties,¹⁵⁷ the "vocal minority" of art dealers, auction houses, museums, and corporate copyright holders that opposed them ultimately prevailed.¹⁵⁸

Since the artist's resale royalty was first proposed one hundred years ago, four major arguments have been consistently made by its opponents: (1) it would damage the existing market for fine art; (2) it would be too difficult to enforce; (3) it would benefit too few artists; and (4) it would be unfair to base it on the resale price.¹⁵⁹

The first argument against the *droit de suite* contends that it would actually hurt artists by driving away investors and depressing initial prices; those in the art market will anticipate the eventual need to pay a resale royalty.¹⁶⁰ In an attempt to support this argument, the Report cited the

152. Ben W. Bolch, William Damon & C. Elton Hinshaw, *An Economic Analysis of the California Art Royalty Statute*, 10 CONN. L. REV. 689 (1978).

153. Perlmutter, *supra* note 24, at 286.

154. *Id.* at 287.

155. *Id.*

156. *Id.*

157. REPORT, *supra* note 19, at 99.

158. For a complete list of the persons and organizations who submitted comments and/or testified for the Copyright Office, see Perlmutter, *supra* note 24, at 288 nn.17 & 18.

159. Perlmutter, *supra* note 24, at 313.

160. REPORT, *supra* note 19, at 142; Perlmutter, *supra* note 24, at 295.

testimony of two leading opponents of the *droit de suite*, Stephen Weil¹⁶¹ and Professor John H. Merryman.¹⁶² These men emphasized that "the artist *may* really suffer from a resale royalty."¹⁶³ Despite this equivocal testimony, Professor Perlmutter pointed out the Report nevertheless claimed that the 1978 study¹⁶⁴ used in Weil's article, and relied upon heavily by the Copyright Office, "found" the primary market prices were depressed as a result of the California law.¹⁶⁵ Perlmutter rebutted this key assumption by asserting that "the study does not provide any evidence of the actual effect of royalties on the primary market, but simply sets forth the authors' own speculation based on economic theory."¹⁶⁶

Most importantly, the Report simply ignored the evidence gathered from jurisdictions with decades of experience with the *droit de suite*. A good example of this disregarded evidence is the 1986 California Lawyers for the Arts survey, which showed that 100% of the art dealers responding said the royalty had no significant effect on their sales.¹⁶⁷ In the New York hearings, John Weber, a dealer who represents numerous artists with resale royalty provisions in their contracts, testified that, in twenty years, he had never seen an original sales price reduced nor had he lost a single sale, because of the possible need to pay a resale royalty.¹⁶⁸

France, Germany and Belgium are the acknowledged leaders in administering and collecting the *droit de suite*.¹⁶⁹ Yet given little apparent weight was the testimony of representatives from those countries who reported that over the years they have experienced a constant increase in the amount of royalties collected, yet have witnessed no reduction in primary sales. The French, inventors of the *droit de suite*, insisted that, relative to the United States and the United Kingdom (two leading non-resale royalty art markets), their market share has remained steady.¹⁷⁰ Mr. Ted Feder, the President of Artists Rights Society, summarized the proponents' counter-argument when he testified that: "Some claim that the

161. See Stephen E. Weil, *Resale Royalties: Nobody Benefits*, ARTNEWS, Mar. 1978, at 58.

162. See generally, Merryman, *supra* note 23.

163. REPORT, *supra* note 19, at 103 (emphasis added).

164. Bolch, et al., *supra* note 152.

165. REPORT, *supra* note 19, at 103 n.29: "[A Vanderbilt University Study] in 1978 found that royalties depressed prices in the primary market and that most artists never made up the initial loss."; see also Perlmutter, *supra* note 24, at 295.

166. Perlmutter, *supra* note 24, at 296.

167. Sky, *supra* note 24, at 319.

168. REPORT, *supra* note 19, at part III, pp. 48-80; Perlmutter, *supra* note 24, at 296; Sky, *supra* note 24, at 319.

169. REPORT, *supra* note 19, at part IV.

170. *Id.* at 189; Sky, *supra* note 24, at 319.

right would drive down the first or subsequent sales price of original works of art, causing hardship to the creators. However, in no country with the resale right has this been known to happen . . .”¹⁷¹

Furthermore, as Professor Perlmutter’s article made clear, opponents of the *droit de suite* contradict themselves with this claim since, as noted below, they also argue that resale of fine art is so infrequent that too few artists will benefit from a resale royalty for it to be worthwhile.¹⁷² If this is true, how could it possibly have such a negative impact on the American art market, as claimed by the dealers and auction houses?¹⁷³

A related assumption underlying this argument is that collectors buy fine art primarily for investment purposes.¹⁷⁴ Thus, it is argued that if payment of a resale royalty is required, reducing investors’ potential profit, they will cease investing in fine art altogether and put their money where it will bring a better return.¹⁷⁵ In reality, almost all collectors purchase specific works of art simply because of their uniquely personal aesthetic appeal. “They want to look at it, live with it at home, and show it to others,”¹⁷⁶ and if they were merely motivated by the possibility of making money, stocks and bonds would be far more rewarding investment vehicles than fine art.¹⁷⁷

The Copyright Office was specifically asked to study possible enforcement mechanisms for collecting the *droit de suite*, since another argument consistently made by opponents is that it would be too difficult to enforce. As noted above, in France, Germany, and Belgium, various artists’ societies have for years successfully distributed substantial amounts of resale royalties collected from sales at auction houses. While experience has shown that it is difficult to collect the royalty from dealer sales as well, Germany has had success with both.¹⁷⁸ Nevertheless, the Report warned that if a resale royalty were passed by Congress, collection from galleries would be a “challenge,” and there would be a “risk of non-compliance.”¹⁷⁹

171. REPORT, *supra* note 19, at 99.

172. Perlmutter, *supra* note 24, at 298.

173. *Id.*

174. *Id.* at 298; *see also* Sky, *supra* note 24, at 320.

175. Sky, *supra* note 24, at 320.

176. *Id.*

177. *Id.*; *see* testimony of Eleanor Dickson, REPORT, *supra* note 19, app., part III, at 41: “Most people buy art because it’s prettier than stock on their walls.”

178. REPORT, *supra* note 19, at 42; Perlmutter, *supra* note 24, at 307 n.101.

179. Sky, *supra* note 24, at 321.

Since law enforcement is always challenging, and instances of non-compliance inevitable, little weight can be given to this objection to the *droit de suite*. After all, "[i]n the modern world, difficulties of detection and enforcement of copyright infringement are common, and legislative solutions can rarely provide complete relief."¹⁸⁰ Despite that fact, for decades, composers' societies have been attempting to collect royalties for every time copyrighted music is played in bars and nightclubs throughout the nation, certainly a more difficult task than collecting on the sale of a single object.¹⁸¹ In sum, "[i]mperfect solutions are better than none,"¹⁸² and "if there were [never any] risk of non-compliance, we would not need most of our laws."¹⁸³

Opponents of the *droit de suite* have also argued that too few artists would benefit from it because some studies have shown that very few artists ever have their works resold.¹⁸⁴ Yet Professor Perlmutter noted that the studies relied upon by the Report to show that the resale market was too small to justify the *droit de suite* were seriously flawed and limited in scope, since they did not include gallery or collector sales, were conducted over a short period of time, and primarily focused on sales at auction houses with minimum prices of \$10,000 or more.¹⁸⁵ It is obvious, however, that the fundamental problem with these studies is that "[t]he auction sales are the tip of the iceberg," and cannot serve as a true measure of the real dimensions of the resale market for fine art.¹⁸⁶

When considering artists' experience with the California Resale Royalty Act, the Copyright Office cited a survey which indicated that few artists or dealers had been involved in the collection of a resale royalty.¹⁸⁷ This created the assumption that this was a further indication that there was an insufficient resale market for fine art, instead of drawing "[t]he more obvious conclusion . . . that the California statute is poorly enforced and underutilized — a conclusion that is virtually unanimous on both sides of the issue."¹⁸⁸

180. Perlmutter, *supra* note 24, at 307.

181. Sky, *supra* note 24, at 321.

182. Perlmutter, *supra* note 24, at 307.

183. Sky, *supra* note 24, at 321.

184. REPORT, *supra* note 19, at 103-05; Perlmutter, *supra* note 24, at 303.

185. REPORT, *supra* note 19, app., part III, at 213-14; Perlmutter, *supra* note 24, at 303.

186. Perlmutter, *supra* note 24, at 303.

187. REPORT, *supra* note 19, at 104; Perlmutter, *supra* note 24, at 303.

188. Perlmutter, *supra* note 24, at 303-04.

While it was evaluating an admitted paucity of information about the American experience with resale royalties,¹⁸⁹ convincing evidence on both the scope of the French resale market and the beneficial effects of the *droit de suite* on French artists was ignored.¹⁹⁰ Jean-Marc Gutton, General Manager of ADAGP, testified that more than \$17,000,000 in resale royalties were collected and distributed to more than 1700 artists in 1990,¹⁹¹ and that the *droit de suite* benefitted far more artists than reproduction rights.¹⁹² Furthermore, 1600 of those artists shared approximately \$8,000,000, while only 50 artists received more than \$40,000 each. These figures, from one of the two French collection agencies, clearly show: (1) that a sizeable resale art market exists in France; and (2) that a resale royalty benefits a significant number of that nation's artists, not just the established ones.¹⁹³

It is obvious that a few famous artists will benefit more from a resale royalty than the vast majority of lesser known ones, but this is merely the logical result of a fair market that by its very nature provides more rewards to those who achieve greater popularity than to those who do not. Therefore, it would be unreasonable to expect all fine artists to forfeit this potentially lucrative reward simply because, as in any other enterprise, those who have the greatest success will benefit the most. Furthermore, this art market "fact of life" does not alter the reality, as evidenced in the hearings, that lesser known artists would still derive significant benefits from the payment of small resale royalties.¹⁹⁴ In short, for American fine artists, (75% of whom are estimated to earn only \$7,000 per year from the sale of their work):¹⁹⁵

Even a royalty of fifty dollars may allow an artist to purchase supplies sufficient to create her next work of art—or to pay the electric bill, allowing her to continue to create rather than devoting all her time and energy to finding another job.¹⁹⁶

189. REPORT, *supra* note 19, at 145: "Because the Copyright Office lacks sufficient current empirical data about several important facts. . . Any conclusions that we could make about the number of artists who would benefit from the resale royalty must be based, therefore, on anecdotal evidence and limited sample size. Most significantly, there is no clear evidence indicating the frequency of resale of works of fine art."

190. Perlmutter, *supra* note 24, at 304; Sky, *supra* note 24, at 321.

191. REPORT, *supra* note 19, app., part III, at 15-16.

192. *Id.* at 45; Perlmutter, *supra* note 24, at 304.

193. Sky, *supra* note 24, at 321.

194. See testimony of Richard Mayer. Report, *supra* note 19, at Appendix Part II, pp. 41-46; Perlmutter, *supra* note 24, at 305.

195. Sky, *supra* note 24, at 322.

196. Perlmutter, *supra* note 24, at 305.

Lastly, an attack that has been made upon the *droit de suite* from its beginnings, and one repeated in the Report, is that "there is something inherently unjust . . . in permitting an artist to benefit from increases [in the value of his work upon resale], without having to share the risk of loss."¹⁹⁷ While admitting that granting a resale royalty only to works of art that appreciate sounds reasonable on its face (i.e., returning to the original jurisprudential basis for the *droit de suite*),¹⁹⁸ Professor Perlmutter countered this argument by noting that the few nations that have used this approach found it to be impractical and impossible to enforce, which has led to subsequent *droit de suite* systems being based on the resale price alone.¹⁹⁹ Ultimately, however, this criticism of the resale royalty simply ignores the fact that:

[M]ost authors are treated no differently. Because they do not typically exploit their own work, but assign rights to a publishing, recording or production company which invests in bringing the work to the public, they benefit from a combination of up-front payments and royalties, without being expected to share in the risk of loss.²⁰⁰

V. THE CASE FOR THE *DROIT DE SUITE*

A. Ending Copyright's Unfair Treatment of Fine Artists

For copyright purposes, a work of fine art has been likened to Cinderella: appreciated for its unique beauty by those who look upon it, yet subject to continuing unfair exploitation by those who control it.²⁰¹ While nominally granted copyright protection by Congress in 1870,²⁰² the *sui generis*²⁰³ nature of the fine arts has never been fully recognized by the law.²⁰⁴ Consequently, artists are not allowed to profit from the

197. REPORT, *supra* note 19, at 135.

198. Perlmutter, *supra* note 24, at 306.

199. REPORT, *supra* note 19, at 13, 48. "In France, Germany, and most other countries with a *droit de suite*, this method of measuring the proceeds right has become accepted as a matter of expediency. Measuring the resale royalty by the sales price is considered simplest and most practical since it is not necessary to keep a record of the previous sales prices."

200. Perlmutter, *supra* note 24, at 307.

201. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503 (1945).

202. Act of July 8, 1870, 41st Cong., 2d Sess. § 86 (1870).

203. See generally Millinger, *supra* note 26.

204. Brenner, *supra* note 26, at 85:

increased value of their work to the same extent as writers and composers.²⁰⁵ Until Congress passes *droit de suite* legislation, or some equivalent, this inequity in the American copyright scheme will remain.²⁰⁶

The subject matter of copyright has expanded steadily since the first federal copyright law was passed over two hundred years ago.²⁰⁷ Originally limited to books, maps, and charts, copyright protection was subsequently granted to etchings,²⁰⁸ musical compositions,²⁰⁹ dramatic compositions,²¹⁰ and photographs.²¹¹ The Act of 1870 finally extended copyright for the first time to paintings, drawings, statues, and designs "intended to be perfected as works of the fine arts."²¹²

The existing copyright rights of reproduction and performance, however, have proven to be nearly valueless because works of fine art are inherently incapable of being reproduced or performed in the traditional sense.²¹³ Furthermore, although the 1976 Act gave fine artists the potentially valuable right to display their work publicly,²¹⁴ as a practical matter, the first sale doctrine terminates this right upon its sale.²¹⁵ Thus, the purchaser has the right to show a painting or a sculpture in a gallery or museum without having to obtain permission from the artist and without having to pay any royalty for its display.²¹⁶ In sum, "the golden eggs of copyright for works of art seldom materialize, and when they do, they appear to have been laid by a hummingbird, not a goose."²¹⁷

Unlike the fairy tale, however, there has been no happy ending to the protection of fine arts under our copyright scheme, at least not yet. Thrown into the copyright statute in the dusk of 1870, the fine arts to this day are grouped with other creative output that bear important functional differences. Those differences have not been accounted for by Congress and the courts however . . .

Id.

205. Millinger, *supra* note 26, at 355.

206. *Id.* at 376.

207. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

208. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (repealed 1831).

209. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1870).

210. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (repealed 1870).

211. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (repealed 1870).

212. Act of July 8, 1870, ch. 230, 16 Stat. 212 (repealed 1904).

213. Perlmutter, *supra* note 24, at 290.

214. 17 U.S.C. § 106(5) (1988 & Supp. 1993).

215. *Id.* § 109(a), (c).

216. Perlmutter, *supra* note 24, at 290 (citation omitted).

217. Brenner, *supra* note 26, at 97.

Since its origins in Roman law, copyright has concentrated on protecting creations capable of being reproduced or "copied" rather than on individual objects.²¹⁸ Fine art, however, is fundamentally different from the other subject matter of copyright. Unlike books, plays, songs, music and motion pictures, the ultimate value of fine art lies in its unique quality as a one-of-a-kind original, not in its potential for mass reproduction or performance.²¹⁹ New technologies for reproducing, recording, and transmitting literary and musical works have enriched the creators of those works by providing payment of additional royalties. On the other hand, fine artists continue to make only a meager living solely from the initial sale price of their work. They are completely cut off from any further participation in the subsequent economic exploitation of their work.²²⁰

Thus, given these inherent limitations for the economic exploitation of fine art by its creator, the traditional rights granted other creators should be augmented with an additional right, the *droit de suite*, which acknowledges the fine arts' "special mode of creation."²²¹ A resale royalty right is grounded in the same underlying copyright principle as other economic rights; that an author should participate adequately in every commercial exploitation of his work. "Such an exploitation of a work of the fine arts occurs with every sale of the work. . . ."²²² While the *droit de suite* is not an exclusive right since it does not allow the artist to prevent the further sale of his work, it is quite similar in nature to a compulsory license, long-recognized in American copyright law, in that the holder of the right is entitled to a royalty every time his work is resold.²²³ By amending the Copyright Act to include a resale royalty, Congress will finally recognize that fine artists have been unfairly denied a right given to all other authors — the right to share in the future economic success of their works.

B. *Fulfilling the Original Intent of the Copyright Clause*

The Constitution's Copyright Clause gives Congress the power "to promote the progress of useful arts, by securing for limited times to authors the exclusive right to their writings."²²⁴ The Clause was modeled after

218. See ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 3-15 (1917).

219. Brenner, *supra* note 26, at 86.

220. DE PIERREDON-FAWCETT, *supra* note 9, at 18.

221. *Id.* at 29.

222. Katzenberger, *supra* note 83, at 367-368.

223. DE PIERREDON-FAWCETT, *supra* note 9, at 29.

224. U.S. CONST. art. I, § 8, cl. 8.

the Statute of Anne, England's first copyright law, which was passed in 1709.²²⁵ Although one commentator states that the legal theory of copyright only emerged after the invention of movable type in 1476,²²⁶ Blackstone argued that English copyright's true origin was in Roman property law.²²⁷ More importantly, one of the primary purposes of both English copyright law and its American descendant has always been to reward the creation of "useful art" by providing economic incentives for its creators. Adding the *droit de suite* to the Copyright Act would further the original intent of the Copyright Clause by "promoting the progress" of the fine arts. It would give artists the potentially lucrative right to participate in the increased value of their work.²²⁸

Charles C. Pinckney and James Madison are generally given credit for drafting the Copyright Clause.²²⁹ The Clause was adopted and signed by the delegates to the Constitutional Convention meeting in Philadelphia on September 17, 1787.²³⁰ It is important to note that its authors intentionally avoided using the term "copyright" in its text, which allowed the Congress to expand copyright's protection far beyond the subject matter of the late eighteenth century.²³¹

The provision was uncontroversial, generating no debate in the convention or during the ratification process.²³² However, the most authoritative source of constitutional intent, *The Federalist*, contains a passage written by Madison that makes it clear that since American copyright was based on the English common law right, "[t]he utility of this power will scarcely be questioned [because] [t]he public good fully coincides . . . with the claims of individuals."²³³

The United States Supreme Court recently reaffirmed this basic copyright principle in *Fogerty v. Fantasy, Inc.*²³⁴ Citing language from

225. An Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19, § 1-11 (Eng.).

226. H. RANSOM, *THE FIRST COPYRIGHT STATUTE* 17 (1956).

227. 2 WILLIAM BLACKSTONE, *COMMENTARIES* 406 (1966); see also E.H. POLLACK, *JURISPRUDENCE* 107-08 (1979).

228. Comment, *Copyright: Droit De Suite: An Artist Is Entitled to Royalties Even After He's Sold His Soul to the Devil*, 45 OKLA. L. REV. 493, 509 (1992).

229. See Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109 (1929).

230. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES (H.R. DOC. NO. 398, 69th Cong., 1st Sess. 706, 745 (1975)).

231. Fenning, *supra* note 229, at 116.

232. 2 GEORGE TICKNOR CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* 340 (Joseph Culbertson Clayton ed., 1896).

233. *THE FEDERALIST* NO. 43, at 288 (James Madison) (Jacob E. Cooke ed. 1961).

234. 114 S. Ct. 1023 (1994).

Sony Corp. of America v. Universal City Studios, Inc.,²³⁵ the Court stated that the Copyright Clause was intended to motivate the creative activity of authors and inventors by the provision of a special reward which must ultimately serve the public good.²³⁶ In short, rewarding the artistic success of individual artists through a resale royalty fulfills the original intent of the Copyright Clause: it gives them an economic incentive to create additional works of art, thus further promoting "the Progress of . . . useful Arts."²³⁷

C. Recognizing Copyright's Foundation in Natural Law

Opponents of the *droit de suite* have argued that it is incompatible with Anglo-American copyright law because of its distinct origin in French law.²³⁸ Yet, a careful analysis of the historical development of both the English law of copyright and its civil law counterpart in France reveals a common root in natural law.²³⁹ It is generally acknowledged that the evolution of moral rights was heavily influenced by natural law jurisprudence,²⁴⁰ but copyright's common law beginning as a natural, perpetual right is almost completely forgotten.²⁴¹ The early misreading of a leading British copyright case²⁴² by the United States Supreme Court led to the erroneous conclusion that Anglo-American copyright was derived solely from a statutory grant.²⁴³ Proper recognition of English copyright's foundation in natural law helps reconcile the apparent differences between American and French copyright law and provides an additional argument for passing *droit de suite* legislation in the United States.

235. 464 U.S. 417, 429 (1984).

236. *Fogerty*, 114 S. Ct. at 1029.

237. *Id.* at 1030 (quotations omitted).

238. Alderman, *supra* note 23, at 267. "The resale royalty, or *droit de suite*, . . . is a foreign concept born of different social and legal systems, and is antithetical to the Anglo-American tradition of free alienability of property."

239. Robert C. Hauhart, *Natural Law Basis for the Copyright Doctrine of Droit Moral*, 30 CATH. LAW. 53, 61-62 (1985).

240. *Id.* at 64.

241. See Kauffman, *supra* note 29. "Copyrights are commonly argued to be purely statutory. And, of course, they are. From this, however, it is further argued that copyrights are only discretionary privileges, not natural, [perpetual] rights. This does not follow. A statute will often codify preexisting rights." *Id.* at 388 (citations omitted).

242. *Donaldson v. Beckett*, 1 Eng. Rep. 837 (1774).

243. Kauffman, *supra* note 29, at 409.

Natural law is one of the oldest known legal theories,²⁴⁴ with two of its earliest advocates being Plato and Aristotle.²⁴⁵ Plato thought it was natural for law to tend toward "the discovery of the ideal form of perfect law,"²⁴⁶ while Aristotle noted the difference between natural justice and conventional justice.²⁴⁷ The primary emphasis of early natural law was determining what was ethical and just as abstract principles common to all of humanity.

Cicero, the Roman lawyer and orator, was a student of the Stoics who revived the study of natural law²⁴⁸ and introduced the concept of *jus gentium*,²⁴⁹ or universal law, into Roman law.²⁵⁰ It is probable that Cicero influenced Gaius, an early commentator on Roman law who argued that natural law was derived from the reason of man, and hence provided the civil law with a non-theistic, philosophical basis.²⁵¹ The first known citation to natural law theory in the context of literary property appears in Gaius' treatise on Roman law.²⁵²

The Greco-Roman theory of natural rights was reasserted by Thomas Aquinas and other Christian philosophers in the twelfth century as a result of the rediscovery of the Roman Law Digests.²⁵³ Since then, there has been a conflict between believers of natural law theories and those who support the concept of positive legal codes.²⁵⁴ "The former relies on reason and conscience to recognize universal, fundamental truths; the latter binds men because of sanctions built into social relationships and enforced by the state."²⁵⁵ Modern parallels to this dichotomy can be seen in the philosophical differences between the French tradition of moral rights and the American history of positive copyright law.²⁵⁶

244. EDWIN W. PATTERSON, JURISPRUDENCE MEN AND IDEAS OF THE LAW 6 (1953).

245. Hauhart, *supra* note 239, at 58 (1963).

246. *Id.* (citations omitted).

247. *Id.* (citing ARISTOTLE, NICHOMACHEAN ETHICS IN THE GREAT LEGAL PHILOSOPHERS 21 (Morris 1959)):

A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not. A rule is conventional that in the first instance may be settled in one way or the other indifferently, though having once been settled it is not indifferent.

248. PATTERSON, *supra* note 244, at 343.

249. *Id.*

250. *Id.*

251. *Id.* at 342.

252. Hauhart, *supra* note 239, at 59 (citation omitted).

253. *Id.* (citing GEORGE WHITCROSS PATON, A TEXTBOOK OF JURISPRUDENCE 99 (4th ed. 1972)).

254. *Id.* at 60.

255. *Id.* (citations omitted).

256. *Id.*

Even though Anglo-American copyright is generally thought to be a purely positivist creation today, there is ample evidence that early English copyright was based on the same natural law jurisprudence as French copyright.²⁵⁷ Blackstone's restatements of the law of literary property relied upon the theories espoused by Gaius in his treatise on Roman law,²⁵⁸ and Blackstone affirmed the natural law origin of literary justice.²⁵⁹ The debates in the sixteenth and seventeenth centuries among authors, booksellers, the public, and the Crown, which ultimately led to the passage of the Statute of Anne, were filled with references to natural law and the "inalienable" rights of authors.²⁶⁰ The first case to examine closely the legal basis of English common law copyright, *Millar v. Taylor*,²⁶¹ clearly reveals the influence of natural law:

The common law, now so called, is founded on the law of nature and reason. Its grounds, maxims and principles are derived from many different fountains . . . from natural and moral philosophy, from the civil and canon law, from logic, from the use, custom and conversation among men, collected out of the general disposition, nature and condition of human kind.²⁶²

In *Millar*, England's highest court at the time, the Court of the King's Bench, was called upon to decide what effect the Statute of Anne had on an author's common law copyright. The suit arose when bookseller Robert Taylor sold several copies of a work without the permission of Andrew Millar, even though he had previously purchased all rights in the book from its deceased author.²⁶³ While the Crown had long recognized that English booksellers had a perpetual property right in the works they owned prior to the enactment of the Statute of Anne, these sales had occurred after the twenty-eight year term of protection provided for in that statute.²⁶⁴ Was copyright still property to be held in perpetuity by its owner?

Blackstone, arguing for Millar, claimed that:

[T]here is a real property remaining in authors, after publication of their works; and that they only, or those who claim under them, have a right to multiply the copies of such literary

257. Hauhart, *supra* note 239, at 65.

258. *Id.* (citing 2 WILLIAM BLACKSTONE, COMMENTARIES 404-07).

259. Kauffman, *supra* note 29, at 404.

260. Hauhart, *supra* note 239, at 65.

261. 98 Eng. Rep. 201 (1769).

262. *Id.* at 223.

263. *Id.* at 204-05.

264. Kauffman, *supra* note 29, at 399.

property, at their pleasure, for sale . . . [and] that this right is a common law right, which always has existed²⁶⁵

The terms "property" and "common law right" were used interchangeably at that time,²⁶⁶ and most importantly, both concepts were accepted by all four judges to be natural rights derived from natural law and justice.²⁶⁷ Further, three of the four also agreed that common law copyright was perpetual in duration,²⁶⁸ despite the statute's imposition of a twenty-eight year limitation. Thus, *Millar* recognized that authors have a natural property right in the fruits of their labor that had always existed at common law and was now merely codified by the Statute of Anne.²⁶⁹

Five years after the issues in *Millar* were decided, the House of Lords reexamined them in a case with substantially similar facts, *Donaldson v. Beckett*.²⁷⁰ In what one proponent of the natural law of copyright characterizes as the pivotal mistake among the "five accidents in copyright law,"²⁷¹ the *Donaldson* court concluded, in a 6-5 vote, that common law copyright had been completely supplanted by the statute, despite its "frequent admission that the natural and common law were the sources for rights that had been incorporated into the Statute of Anne."²⁷² Thus, English copyright was erroneously transformed from an innate right of authors derived from natural law into "nothing but a statutory privilege, a mere gift from Parliament."²⁷³

The United States declared its independence from Great Britain two years after *Donaldson*, but the new nation was still influenced by the English common law, including its original view of copyright as a natural right of authors.²⁷⁴ Further, the two most far-reaching events of the eighteenth century's Age of Enlightenment, the American and French Revolutions, were both fundamentally based on natural law theories.²⁷⁵

265. *Millar*, 98 Eng. Rep. at 202.

266. Kauffman, *supra* note 29, at 399.

267. *Id.* at 399 n.86. "[T]he law of England with respect to all personal property, had its grand foundation in natural law." *Id.*

268. "The property of the copy . . . [may] go down from generation to generation, and possibly continue for ever; . . ." *Millar*, 98 Eng. Rep. at 251.

269. Kauffman, *supra* note 29, at 401.

270. 1 Eng. Rep. 837 (1774).

271. See Kauffman, *supra* note 29, at 386-414.

272. Hauhart, *supra* note 239, at 66.

273. Kauffman, *supra* note 29, at 401.

274. *Id.* at 403.

275. Jefferson's Declaration of Independence is premised on natural law principles: "We hold these truths to be self evident, that all men are created equal; they are endowed by their Creator with certain inalienable rights . . ." Thomas J. Brogan, *The Natural Law and the Right to Liberty*, 4 NOTRE DAME NAT. L. INST. PROC. 24, 26 (Edward F. Barrett ed. 1951); "French

It is clear that the Founders were influenced by the natural law theories of Locke, Montesquieu, and Rousseau when they were drafting the Constitution's provisions, including its guarantees that the government shall not violate the inalienable rights of American citizens.²⁷⁶

The Copyright Clause was originally intended to promote the public good by rewarding those responsible for the creation of useful works.²⁷⁷ Its co-author, James Madison, must have been aware of the decisions in *Millar* and *Donaldson* since he cited their holdings in *The Federalist*: "The copy right [sic] of authors has been solemnly adjudged in Great Britain to be a right at common law."²⁷⁸ Despite this constitutional history, which was based on *Donaldson's* acknowledgement of a common law copyright now codified and limited by the Statute of Anne, the United States Supreme Court, in *Wheaton v. Peters*,²⁷⁹ denied that such a common law right ever existed. In the American view, "statutory protection [of copyright] not only secured common law rights and superseded them, it essentially negated and replaced them."²⁸⁰

The existence of a common law copyright derived from natural law was reaffirmed, however, in the dissenting opinions of Justice Thompson and Justice Baldwin.²⁸¹ In Justice Thompson's opinion, common law copyright was "established in sound reason and abstract morality,"²⁸² which was protected by the "principles of right and wrong, the fitness of things, convenience and policy."²⁸³ Nevertheless, by disregarding Madison's belief that the Copyright Clause merely gave Congress the power to secure the natural right of authors at common law, as Parliament did with the Statute of Anne, the *Wheaton* majority's misunderstanding of the true origins of Anglo-American copyright became precedent,²⁸⁴ and was later incorporated into the legislative history of the 1909 Act.²⁸⁵

scholars regard the *droit l'auteur* as a natural right, deeply rooted in the principles of the French Revolution from which modern French jurisprudence emerged." Russell J. DaSilva, *Droit Moral and the Amoral Copyright*, 28 BULL. COPYRIGHT SOC'Y 1, 7 (1980).

276. HEINRICH A. ROMMEN, *THE NATURAL LAW* 75-109 (Thomas R. Hanley trans. 1947); see also 2 JOHN LOCKE, *TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Charles L. Sherman ed., 1690).

277. *THE FEDERALIST* NO. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961).

278. *Id.*

279. 33 U.S. (8 Pet.) 591 (1834).

280. Hauhart, *supra* note 239, at 67.

281. *Id.* at 68.

282. *Wheaton*, 33 U.S. (8 Pet.) at 672 (Thompson, J., dissenting).

283. *Id.* at 671.

284. Kauffman, *supra* note 29, at 411.

285. "[Copyrights are] not based upon any natural right The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it

Despite this disavowal by the courts and Congress, early American commentators continued to recognize natural law's contributions to the development of common law and statutory copyright protections for authors.²⁸⁶ In addition, the natural law basis of all copyright laws provided a legal rationale for the first supporters of an international copyright treaty,²⁸⁷ who ultimately prevailed with the worldwide adoption of the Berne Convention.²⁸⁸

Clearly, the legal basis of Anglo-American copyright can be found in natural law, since early Roman law theories of literary property were used by English judges to affirm the pre-existence of a common law copyright, which was later codified and then relied upon by American courts. The Founders of the United States, living in an age which exalted the concept of natural rights, clearly relied on these and other natural law principles when drafting the Declaration of Independence and the Constitution, including the Copyright Clause. Hence, while it is generally assumed that the French origins of the *droit moral* and the *droit de suite* are incompatible with United States copyright theory, a careful examination of the history of British and American copyright demonstrates their shared reliance on natural law.²⁸⁹ Thus, the enactment of a resale royalty by Congress, which is often characterized as both a moral right and an economic right, would be an appropriate recognition of the natural law foundations of both French and Anglo-American copyright law.

D. Adhering to the Provisions of the Berne Convention

On October 31, 1988, President Reagan signed the Berne Convention Implementation Act ("BCIA"), which required adherence to its provisions by the United States after March 1, 1989.²⁹⁰ The moral rights protections

thinks best." H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).

286. Hauhart, *supra* note 239, at 68 (citation omitted).

287. *Id.* (citation omitted).

288. *Id.*

289. Hauhart, *supra* note 239, at 69.

[T]he philosophical origin of the theory of the author's creative and moral rights may be found in natural law. Natural law theories of property found in the early Roman law and adopted by the English provide one source of data. . . . The best argument that can be made is that the *droit moral* has its philosophical roots buried deeply in natural law theories that permeate both the later English and American common law and the natural rights movements of the eighteenth, nineteenth, and twentieth centuries. *Id.*

290. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter "BCIA"].

provided by Article 6bis²⁹¹ of Berne had always been one of the major obstacles preventing U.S. adherence in the past.²⁹² This reluctance to expressly adopt the provisions of 6bis was overcome when Congress characterized Berne as an executory treaty requiring implementing legislation before it could take effect.²⁹³

Before passing such legislation, Congress appointed the Ad Hoc Working Group on U.S. Adherence to the Berne Convention ("Working Group") to examine U.S. law and to determine whether there were rights existing under state and federal law that could be analogous to the moral rights provisions of the Berne Convention.²⁹⁴ Despite disagreement among copyright experts,²⁹⁵ the Working Group concluded that the United States already adequately protected moral rights,²⁹⁶ thus eliminating the need for any additional recognition in the implementing legislation. In fact, the BCIA explicitly states that United States adherence to Berne did not create any new rights for authors.²⁹⁷ Some commentators, however, still question the accuracy of these unilateral declarations

291. Article 6bis states:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Copyright Union: Item H, art. 6bis, reprinted in *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 547 (1986) [hereinafter "Berne Report"].

292. Chinni, *supra* note 50, at 148. See also Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1 (1988); Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 1 (1988).

293. Doriane Lambelet, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 479 (1987) (citations omitted).

294. Rowe, *supra* note 119, at 393.

295. See, e.g., Edward J. Damich, *Moral Rights in the United States and Article 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 655 (1986).

296. The Berne Report states:

Given the substantial protection now available for the real equivalent of moral rights under statutory and common law in the U.S., the lack of uniformity in protection of other Berne nations, the absence of moral rights provisions in some copyright laws, and the reservation of control over remedies to each Berne country, the protection of moral rights in the United States is compatible with the Berne Convention.

Berne Report, *supra* note 291, at 535.

297. "The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State or the common law. . . ." BCIA, *supra* note 290, at § 3(b).

by Congress that no new federal legislation is needed to fulfill our obligations under the treaty.²⁹⁸

As noted previously, the *droit de suite* is properly seen as an additional moral right derived from the right of paternity, even though the 1948 Brussels Revision of Berne recognized its unique status as half moral right and half pecuniary right by providing for its enforcement in a separate article.²⁹⁹ Despite the fact that Berne's *droit de suite* is currently an optional provision for its eighty-five member nations, twenty-eight countries have already enacted a resale royalty right and many more nations are considering it.³⁰⁰

The United States is one of the world's largest exporters of copyrighted works, which generate billions of dollars of trade surplus each year.³⁰¹ As such, the United States has worked to ensure international protection for those works by acceding to the Berne Convention and by becoming a signatory to the General Agreement on Tariffs and Trade ("GATT").³⁰² Because Berne has provided a detailed and comprehensive international copyright system for over one hundred years, members of GATT have looked to Berne for guidance in resolving problems involving trade-related aspects of copyright, especially piracy.³⁰³ When United States accession to Berne was being considered by Congress, Senator Charles Mathias, then Chairman of the Senate Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks, stated that "GATT requires a mature standard of copyright principles as a yardstick for evaluating trade barriers. The Berne Convention provides that yardstick."³⁰⁴ Thus, both the Berne Convention and GATT can be seen as part of a larger world-wide movement to provide uniform protection for intellectual property rights through the creation of an international body of law.³⁰⁵

Five years ago, the United States finally signed the Berne Convention after decades of resisting pressure to change United States copyright law,

298. See, e.g., Chinni, *supra* note 50, at 173. "If American law currently provides the minimum protection for moral rights required by article 6*bis* of the Berne Convention, it does so only barely." *Id.*

299. For a discussion of the *droit de suite*'s hybrid nature see *supra* notes 9-11 and accompanying text.

300. DE PIERREDON-FAWCETT, *supra* note 9, at 6.

301. Crabbs, *supra* note 30, at 167.

302. GATT seeks the promotion of international free trade through the lowering or elimination of tariffs and other trade barriers. See Lambelet, *supra* note 293, at 472 n.21.

303. Lambelet, *supra* note 293, at 472 n.21 (citations omitted).

304. 132 CONG. REC. S14,508-09 (1986).

305. Crabbs, *supra* note 30, at 168.

which fell short of the minimum standards required by the Berne Convention.³⁰⁶ In 1988, Congress declared in the BCIA that there was no need to legislate additional moral rights protections in order to adhere to the Berne Convention.³⁰⁷ Nevertheless, Congress enacted VARA two years later to make those protections more explicit, at least for visual artists,³⁰⁸ and helped bring American law into closer compliance with the international copyright scheme provided by the Berne Convention.³⁰⁹

Ironically, now that the United States is a signatory, there is a major obstacle in the way of this reluctance to harmonize U.S. copyright law with Berne. The one hundred year history of Berne revisions shows a clear and continuing trend toward increased protections for authors, more uniform protections for copyright holders, as well as a steady increase in moral rights provisions for artists, which were first added in 1928.³¹⁰ Whenever future revisions to Berne are added as mandatory provisions for all member nations, future compliance with Berne will require Congress to adhere to them in some manner, because Article VI of the Constitution declares that "all [t]reaties . . . shall be the supreme Law of the Land. . . ."³¹¹

This nation is now part of an international community that recognizes the necessity and desirability of moral rights for artists generally, and to an increasing extent, the *droit de suite* specifically.³¹² The United States should assume the leadership position that the proper international protection of its valuable copyright exports require.³¹³ Rather than waiting to see if the members of the European Economic Community enact more uniform protection of the *droit de suite*, Congress should recognize that current protections for fine artists will not be adequate for compliance with Berne over the long term.³¹⁴ Congress should amend the Copyright Act to include a resale royalty as provided in Article 14*ter*, thus moving the United States another step closer to full adherence with both the letter and the spirit of the Berne Convention.

306. Chinni, *supra* note 50, at 146.

307. *Id.* at 166.

308. *Id.* at 167.

309. *Id.* at 174.

310. *Id.* at 161.

311. U.S. CONST. art. VI, cl. 2.

312. DUCHEMIN, *supra* note 32, at 149.

313. Crabbs, *supra* note 30, at 174.

314. Chinni, *supra* note 50, at 174.

VI. CONCLUSION

American fine artists should have the right to a resale royalty because: (1) United States copyright law unfairly limits their ability to participate in the economic exploitation of their work; (2) the *droit de suite* fulfills the original intent of the Copyright Clause by promoting the creation of additional works of fine art; (3) copyright is derived from natural law, which recognizes the inalienable right of all creators to a continuing relationship with their work; and (4) it is in the long term interest of the United States to become a leader in international copyright law by voluntarily adhering to the *droit de suite* provisions of Article 14*ter* of the Berne Convention.

One commentator predicted nearly thirty years ago that reaction to an artist's resale royalty would be divided into "two classes: dealers in art work and everyone else."³¹⁵ Even though art dealers routinely take fifteen to twenty-five percent commissions from the sale and resale of fine art, their trade associations and lobbying groups strenuously object to an additional three to five percent for the artists who create the work itself.³¹⁶ As recently as 1988, a dealer resold a painting by Jasper Johns for \$17.1 million, yet Johns received nothing.³¹⁷ As one *droit de suite* proponent put it, "Why should artists be the only socialists in this capitalist society? If they are successful, why shouldn't they get richer just like anyone else?"³¹⁸ Fundamental fairness requires that fine artists be given the same economic opportunity under the Copyright Act as other creators.

One of the underlying objectives of the Copyright Clause is to promote the progress of the arts. The United States Supreme Court, in its unanimous decision in *Fogerty v. Fantasy, Inc.*,³¹⁹ reaffirmed this basic copyright principle when it stated that the Copyright Clause was intended to motivate creativity "by the provision of a special reward."³²⁰ There can be no doubt that an American *droit de suite* would be such a special reward.

It is said that the *droit de suite* is a French moral right incompatible with Anglo-American copyright. A closer examination of the historical origins of copyright law in France and England shows that the copyright

315. Schulder, *supra* note 104, at 43.

316. *Id.*

317. Goetzl, *supra* note 28, at 255 (citation omitted).

318. *Id.*

319. 114 S. Ct. 1023 (1994).

320. *Id.* at 1029.

traditions of both nations share a common foundation in natural law. The leaders of the French and American Revolutions were heavily influenced by natural law principles and believed that natural justice for all people could be achieved by relying on reason and conscience to recognize universal, fundamental truths.

Since natural law underlies both United States and French copyright law, it is reasonable to insist that American fine artists be given the same rights as their counterparts in France. Congress can achieve a fitting form of natural justice³²¹ by enacting a resale royalty, which is a unique blend of moral and economic rights.

The United States adhered to the provisions of the Berne Convention six years ago. Since then, Congress has acted to fulfill its treaty obligations by explicitly guaranteeing certain moral rights for visual artists as required under Article 6*bis*. This nation can further enhance its leadership role in promoting international copyright law by passing legislation that creates, in accordance with Article 14*ter* of the Berne Convention, an American version of the *droit de suite*.

321. "What is justice, if not the proportion between cause and effect, between work and compensation?" Report on the bill on literary property submitted by Alphonse de Lamartine to the Chamber of Deputies on Mar. 13, 1841.